SUPREME COURT, U.S.
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No. 98-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

v.

IRENE HALLIGAN, as Executrix of the Estate of
THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners Piper Jaffray, Inc. and Marvin Geisness respectfully submit this Reply Brief in support of their petition for a writ of *certiorari* ("Pet.") to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REASONS FOR GRANTING THE WRIT

Respondent Irene Halligan's opposition brief ("Resp. Br.") does nothing to counter the ample justification for issuance of a writ of *certiorari*. As argued in the Petition, and as amplified below, this case presents this Court with the opportunity to rectify a split among the Circuits as to the appropriate scope of judicial review of arbitrators' awards, an issue of increasing national importance in light of the longstanding federal policy favoring arbitration and the continuing trend toward the use of arbitration as a cost-effective and expeditious method of dispute resolution.

The most conspicuous feature of Respondent's brief is its intensive but highly selective focus on the particulars of Mr. Halligan's claim of age discrimination against Petitioners. Respondent goes to great lengths to argue that Mr. Halligan was, in fact, discriminated against, citing repeatedly to the evidentiary record in the case. Given the nature of this *certiorari* proceeding, it is unnecessary to dispute each of these factual points, nor will Petitioners endeavor to do so. It suffices for present purposes to state only that the facts of the case were not nearly as one-sided as Respondent portrays. Instead, there was sharp disagreement, often fundamental contradiction, on nearly every material factual issue.[1]

In her effort to demonstrate the factual soundness of the Second Circuit's decision, however, Respondent unwittingly supports *Petitioners'* position rather than her own. For in so doing, she demonstrates the extent to which the Second Circuit's decision was based on the court's disagreement with the arbitrators' resolution of the *facts*, not on any view that the arbitrators misapplied or failed to apply the *law*. In reaching that result, the court did more than simply err; it applied an altogether new approach to judicial review of arbitral decisionmaking, one that permits vacatur of rulings that reflect not just "manifest disregard of the law,"

1. By saying that the arbitration was "hotly contested," Petitioners did not imply, as Respondent apparently believes, that the proceedings were not handled with civility and courtesy on the part of all concerned. *See* Resp. Br. at 5. Rather, the point was to emphasize the persistent factual disputes that characterized the arbitration.

but "manifest disregard of the law *or the evidence or both*." Indeed, it is impossible to read the Second Circuit's decision any other way. When the court expressly acknowledged that the arbitrators had been properly advised as to the law, *see* Pet. at 15a, it implicitly eliminated the only acceptable basis for finding "manifest disregard," *i.e.*, a serious legal error. Instead, the court made clear that its holding was based on its own independent review of the factual record.

Respondent, for her part, appears to acknowledge this. In attempting to fit the square peg of the Second Circuit's decision into the round hole of the "manifest disregard of the law" standard, she is forced to argue that "arbitrators who ignore the evidence in an ADEA case perforce ignore the law." Resp. Br. at 9. The effort is wholly unconvincing. For one thing, it ignores this Court's holding in *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982), that "discriminatory intent is a finding of fact." More broadly, the argument overlooks the Second Circuit's express articulation of its new standard: "manifest disregard of the law *or the evidence or both*." If it were truly possible, on this record, to conclude that the arbitrators disregarded only "the law" by ruling against Respondent, the court of appeals surely would have said so.

Respondent then makes the convoluted argument that disregarding the evidence is really the same as "refusing to hear evidence pertinent and material to the controversy," which is a basis for vacatur under section 10(a)(3) of the FAA, 9 U.S.C. § 10(a)(3). *See* Resp. Br. at 11-12. The argument makes no sense. Courts applying the FAA have made clear for decades that the scope of judicial review of arbitral factfinding is extremely narrow, and that the "manifest disregard of the law" standard does not permit courts to second-guess arbitrators' assessment of the facts. Not surprisingly, Respondent does not cite a single case in which a court has suggested that section 10(a)(3) (or its predecessor) permits vacatur where, as here, the court simply disagreed with the arbitrators' factual conclusions.[2] Indeed, Respondent herself sought vacatur of the award in this case under section 10(a)(3), but for

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2. The one case Respondent does cite, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), involved a straightforward application of section 10(a)(3): vacatur based on the arbitrators' unwarranted refusal to allow the testimony of a material witness. Nothing in the case supports Respondent's effort to equate section 10(a)(3) with the more generalized fact-based review the Second Circuit undertook in this case.

reasons completely different from her "manifest disregard" argument. *See* Pet. at 33a-36a.

With respect to the novelty of the Second Circuit's approach in this case, Respondent contends that three of the cases Petitioners cited do not "concern" the "manifest disregard" doctrine. *See* Resp. Br. at 5. Respondent is mistaken. Of those three cases, two – *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) (Posner, J.), and *Trans Chem. Ltd. v. China Nat'l Machinery Import and Export Corp.*, 161 F.3d 314 (5th Cir. 1998) (per curiam) – directly applied the "manifest disregard" standard.[3] The third, *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), did not use the "manifest disregard" articulation of the standard, but applied its functional equivalent, noting the "extremely limited" scope of judicial review of arbitral awards. *See id.* at 998 ("We may not set an award aside simply because . . . the arbitrators erred in interpreting the law *or in determining the facts*.") (quoting *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 594 (8th Cir. 1998)) (emphasis added).

Respondent also asserts that "[n]o other Circuit Court has permitted an arbitration award to stand where arbitrators have either manifestly disregarded the law or the evidence or both in deciding a claim in arbitration." Resp. Br. at 17. It is difficult to imagine how Respondent can make such a brazen (and unprovable) assertion. Nonetheless, Respondent has it backwards: the important point, for purposes of the instant Petition, is that no other court of appeals or district court of which we are aware has *struck down*, like the Second Circuit in this case, an arbitral award based on "manifest disregard of the evidence."[4]

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3. The Seventh Circuit in *Baravati* expressly stated that it has adopted the "manifest disregard" standard, but expressed discomfort with that nomenclature. *See* 28 F.3d at 706. It also stated, in a passage of particular relevance here, that review of arbitration awards "for clear error," *i.e.*, for mistaken factual conclusions, would be "inconsistent with the entire modern law of arbitration." *Id.* In *Trans Chemical*, the Fifth Circuit explicitly adopted sections of the district court's opinion, the pertinent passage of which noted the applicability of the "manifest disregard" standard. *See* 161 F.3d at 319 (adopting 978 F. Supp. 266 (S.D. Tex. 1997)).

4. The Second Circuit summary order appended to Respondent's brief, *Chisolm v. Kidder, Peabody Asset Management*, No. 97-7828 (2d Cir. July 28,

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On another point, however, Respondent is exactly right. She states: "Petitioners cite no case in which errors in fact made by arbitrators have been deemed to be the equivalent of a manifest disregard of the evidence by any Court." Resp. Br. at 17. That is the crux of the argument in favor of a writ of *certiorari* in this case. Until this decision, no court had done what the Second Circuit did here: elevate a *factual* disagreement with the arbitrators' conclusions into a holding that the arbitrators engaged in "manifest disregard of the law or the evidence or both." That decision creates an entirely new standard of judicial review, at odds with the approach of every other Circuit, on an issue of great importance.

As to the importance of this issue, Respondent has little to say, focusing solely on Petitioners' contentions concerning the issuance of written opinions. Petitioners recognize that the Second Circuit carefully avoided setting a blanket rule that all arbitrators must issue written opinions. But its decision – that is, the language of the opinion read in light of the specific circumstances of this appeal – leaves little room for any arbitrators to conclude otherwise, at least in closely contested factual cases, lest their rulings be at great peril of vacatur. This is in itself a departure from Second Circuit precedent, under which the lack of a written opinion was cause for greater deference to the arbitrators, not less. *See* Pet. at 15-16.

In focusing on the written-opinion issue, moreover, Respondent misses the larger point. This case warrants issuance of a writ of *certiorari* not only because the Second Circuit departed from its own precedents and placed itself at odds with the other Circuits in this area. *Certiorari* is warranted because the court's decision disrupts the long-established judicial deference to arbitrators' findings of fact, and thus destabilizes the very institution of arbitration itself. In that respect, this case raises issues of true national significance. The federal policy favoring arbitration – reaffirmed by this Court earlier this Term, and declared by Congress in 1991 to apply specifically to employment discrimination cases, *see* Pet. at 17 – requires that courts not sit as super-arbitration panels. The cost- and time-saving advantages of arbitration over traditional litigation are

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1998), is, by its very terms, of no precedential value. The order states that it "may not be cited as precedential authority to this or any other court" except in limited circumstances not applicable here. *See* Resp. Br. at 1a. Respondent's thinly veiled suggestion that Petitioners somehow acted improperly in not citing it, *see id.* at 14, is thus incorrect.

rendered meaningless where the losing party gets two additional, virtually *de novo* "bites at the apple" in federal court after the arbitral decision is issued.[5]

The Second Circuit's decision presages just such a result, not only in this case but in other cases where the district court or court of appeals disagrees with the arbitrators' factual findings. Notwithstanding Respondent's attempt, particularly in her articulation of the Question Presented, to limit the effects of the court's decision to situations where employees are "required to arbitrate," *see* Resp. Br. at i, the Second Circuit said nothing to suggest that its new standard of review was limited to any particular setting in which arbitration arises. If anything, the court's opinion can be read to affect judicial review of arbitration awards in *every* context, not just in circumstances closely similar to this case. *See* Pet. at 17-18.

Nonetheless, the Second Circuit's decision strongly appears to have been colored by the panel's apparent hostility toward arbitration in general, or at least arbitration in the context of pre-dispute agreements. *See* Pet. at 9a-14a. This Court has explicitly dispensed with such notions, upholding the enforceability of pre-dispute agreements to arbitrate age discrimination claims and rejecting "generalized attacks on arbitration" as a method of resolving such claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Respondent indulges in the same misconception, attempting to impugn arbitration in general by alluding to the length of the proceedings in this case. *See* Resp. Br. at 4-5. Left unstated in her argument is the unmistakable fact that the Second Circuit's decision would foster the ultimate inefficiency: forcing the parties to try this protracted case over again, based solely on the court's perception that the arbitrators reached the wrong result on the facts.

CONCLUSION

For the foregoing reasons, and for the reasons argued in Petitioners' initial brief, the petition for a writ of *certiorari* should be granted.

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5. Respondent makes the remarkable assertion that Petitioners "do not contend that the Second Circuit Court of Appeals erred in ruling that [the] NASD arbitrators 'manifestly disregarded the law' in the *Halligan* case." Resp. Br. at 7. There is nothing in Petitioners' brief that supports such a far-fetched conclusion. Suffice it to say that Petitioners do contend, most emphatically, that the Second Circuit erred.

Respectfully submitted,

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